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From:

Sent: Thursday, October 21, 2010 9:21:54 AM

To:

Cc:

Subject: Question concerning the privacy of appraisal reports

You have asked for Counsel's assistance with respect to whether a redacted version of an appraisal report is taxpayer information. We conclude that the appraisal report, even though stripped of the taxpayer's name or number and of the artwork's title, is return information. Section 6103 provides that return information includes material prepared by or collected by the Service with respect to the determination of a taxpayer's liability. The appraisal report meets this definition because it is prepared by the Service in determining the valuation of items claimed on the taxpayer's return and includes data submitted as part of the tax return. The Supreme Court has held that mere redaction of identifying data from return information does not alter its status. Therefore, redaction of the taxpayer's name or the artwork's title from the appraisal report does not change the report's status as return information. Please consult part II of the "Law & Analysis" section on pages 4-6 of the memo addressed to , dated September 28, 2009 and attached to this email. If you have further questions, please let me know.

Subject: Art Appraisal Services Modernization/Transmission of Appraisal Information

ISSUE

Whether the packet of materials distributed to members of the Service's Art Advisory Panel contains personally identifiable information. The packet, distributed prior to the Panel's annual meetings, consists of information derived from the taxpayer appraisals and also market research performed by the Service's Office of Art Appraisal Services.

CONCLUSION

No. The packet of materials sent to the panel members, consisting of information derived from the taxpayer's appraisal as well as market research performed by the Service's Office of Art Appraisal Services, does not contain personally identifiable information. The packet, however, to the extent it consists of information derived from taxpayers' appraisals, does contain return information as defined by section 6103. The packet should be subject to the type of protection generally afforded return information.

FACTS

The Service's Office of Art Appraisal Services reviews and evaluates property appraisals submitted by taxpayers in support of fair market value claims for works of art on certain federal tax returns. As part of this review, Art Appraisal Services will consult a panel of outside experts, the Art Advisory Panel, for their opinion on the value of certain objects. Typically, Art Appraisal Services consults the panel with respect to objects whose value is greater than \$20,000. The Commissioner appoints members of this panel as special employees of the Internal Revenue Service. The panel generally meets a few times a year, depending on the particular category of objects under review. For example, in 2008, the panel on Paintings & Sculpture met twice whereas the panel on Decorative Arts & Antiques met only once. At these meetings members discuss upwards of 300 objects in a one or two day session and offer opinions as to the value of the object under review. On some occasions, a panel member may recognize the object and provide additional information to other members.

Prior to the panel meeting, the Service sends a packet of materials to panel members that assists in their preparation. This packet of materials generally consists of a description of each object under review, a photograph of the object, and information on private and public sales of comparable artwork. In addition, the packet provides a valuation date and claimed value with respect to each object. The valuation date is generally the last month of the tax year under review, but can be the month of death in cases where the object under review has been included on an estate tax return. The claimed value is the amount entered on the return.

The information included in the packet generally derives from the property appraisal submitted by the taxpayer and attached to the tax return. The property appraisal provides detailed information about the object under review including the artist's name, the title of the piece, its size, the medium, its physical condition, and the provenance of the particular work. The appraisal also includes a photograph of the object and information on sales of other artwork comparable to the object under review. In lieu of including the property appraisal itself in the packet, Art Appraisal Services will summarize the contents of the appraisal and reformulate the information so that it is uniform with respect to each object. Art Appraisal Services also includes with this information its own market research on relevant sales. In addition, Art Appraisal Services will include photographs of the comparable objects sold, including photographs of the comparable sales listed in the appraisal, as those photographs are not generally provided.

Art Appraisal Services currently delivers this packet of materials through regular channels of mail. Recently, this method has become cumbersome and inefficient in light of the number of panel members, the number of objects under review and the copious amount of information included with respect to each object. Art Appraisal Services is in the process of modernizing its delivery methods. The modernization effort could include scanning photographs, uploading information onto the computer, and sending materials to panel members via electronic means. Whether the packet of materials contains personally identifiable information affects the Service's consideration in modernizing its methods of delivering the packet. See generally IRM 10.8.1.3.1.1.2 (March 03, 2008).

LAW AND ANALYSIS

The term "Personally Identifiable Information (PII)" is referenced and defined in multiple sections of the Internal Revenue Manual (IRM). Generally, PII is any information or combination of information that can be used to uniquely identify a person. Examples of PII include a taxpayer's name, birth date, social security number, bank account information and any other information that alone or in combination with other data can identify an individual. For the reasons set forth below, we conclude that the packet of materials does not contain PII. The packet does not contain PII because the packet does not contain information which can be used to uniquely identify an individual. However, the packet of materials does contain the return information of taxpayers with respect to whom the Art Advisory Panel provides appraisal services as part of the Service's determination of the taxpayers' liability.

Section 6103(b)(2)(A) defines "return information" as

a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary

with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense,

I. The packet does not contain personally identifiable information because the information in the packet cannot be used to uniquely identify an individual.

PII is defined and referenced in multiple sections of the Internal Revenue Manual. Though these definitions vary somewhat, they are consistent in that PII is information that alone, or in combination with other information, can be used to uniquely identify an individual.

PII is defined in IRM 10.5.3, Identity Theft and Incidence Management (ITIM) Program, as

A specific type of IRS sensitive but unclassified (SBU) data¹ which can be used to distinguish or trace an individual's identity, such as their name, social security number, biometric records, etc., alone, or when combined with other personal or identifying information is linked or linkable to a specific individual, such as date and place of birth, mother's maiden name, etc.

IRM Exhibit 10.5.3-1, Glossary. This definition mirrors the definition provided in a 2007 Office of Management and Budget (OMB) memorandum that required federal agencies to develop and implement proper safeguards and breach notification policies for PII. See OMB, Safeguarding Against and Responding to the Breach of Personally Identifiable Information, M-07-16, n.1 (May 2007). The Service created the ITIM program in response to these OMB directives, and therefore the definition of PII under this chapter provides guidance for determining the definition of PII. See IRM 10.5.3.1.1(4) (May 15, 2009).

A more comprehensive definition for PII can be found in IRM Chapter 10.8, Information Technology (IT) Security, where PII is also defined as a category of SBU data. There, PII is specifically defined as "all taxpayer information or any combination of information that can be used to uniquely identify, contact or locate a person." IRM 10.8.1.3.1.1.1(2)(e) (March 3, 2008) PII includes the personal information of taxpayers, and the personal information of employees, contractors, applicants, and visitors to the IRS. Examples of PII include, but are not limited to: name, address, social security number, date of birth, home telephone number, biometric data, and other numbers or information that alone or in combination with other data can identify an individual. IRM 10.8.1.3.1.1.2(1) (March 3, 2008).

These examples are all similar in that they are a form of personally identifying data, the unauthorized release of which could prove calamitous for the individual. The packet

¹ "Sensitive But Unclassified (SBU)" information is any information that requires protection due to the risk or magnitude of loss or harm to the IRS or to the privacy of individuals, which could result from inadvertent or deliberate disclosure, alteration, or destruction. IRM 10.8.1.3.1.1.1(1) (March 3, 2008).

does not contain any of these traditional examples of PII. The packet does not provide the taxpayer's name, an address, any identifying numbers, or any other identifying data. Nonetheless, the packet does contain return information. PII can include return information if that information can be used to identify an individual. The information presented in the packet, including the description of the work and its provenance, could reveal the identity of the object owner to some panel members or others who may, legitimately or otherwise, gain access to the materials.

Aside from someone who is particularly knowledgeable within the art community, the average individual could not discern the object's owner merely using the information from the packet. The information contained in the packet identifies and describes the object under review, not the owner of the object. The packet does not contain a name, an address, social security number, bank account information, biometric data or any data particular to any individual taxpayer. Only with a particularly instructive provenance and some time and research could the average person discover the object's owner using information from the packet in combination with other outside information. The definition of PII, though broad, would not seem to encompass such forms of data. In contrast to social security numbers and bank account information, the fact of ownership of a significant tangible asset does not pose as great a risk to the individual. As such, we conclude that only that data which is personal and linkable to a particular taxpayer fall within the scope of PII. Therefore, because the packet lacks any of the traditional types of personally identifying data, the packet does not contain PII.

II. The packet contains "return information" as defined by section 6103.

Section 6103 of the Internal Revenue Code provides for the confidentiality of returns and return information. Section 6103(b)(2)(A) provides the term "return information" includes, but is not limited to, the following: a taxpayer's identity; the nature, source, amount of his income, payments, or deductions; whether the taxpayer's return was or is under investigation; and any other data received by, prepared by, or collected by the Service with respect to a return or the determination of the existence of tax liability. "Return information" is broadly construed and generally includes any information gathered by the Service with regard to a taxpayer's liability. See, e.g., Chamberlain v. Kurtz, 589 F.2d 827, 841 (5th Cir.), cert. denied, 444 U.S. 842 (1979) ("[M]aterial prepared or collected by the Service with regard to [a taxpayer's] potential liability for deficiencies or penalties clearly represents return information.").

Based on the foregoing, we conclude that the packet does contain "return information" as defined by section 6103. First, the "Claimed Value" amount constitutes return information because the entry reflects either the amount of a claimed deduction or the value of an asset of the estate. This type of information falls squarely within the definition of return information set forth in section 6103(b)(2)(A).

Second, the description of the object under review and comparable sales information constitute return information to the extent such information derives from the taxpayer's appraisal attached to the return. Here, both the description of the object, including details such as its title, artist, size, condition, and provenance, and the information on

comparable sales are taken from the taxpayer's appraisal. The Service requires taxpayers to attach this appraisal to their returns for deductions greater than \$20,000, which mirrors the threshold for review by the Art Advisory Panel. See Instructions for Form 8283 (Dec. 2006); IRM 4.48.2.2(2) (February 20, 2001). Art Appraisal Services will then use the taxpayer's appraisal in its determination of value for inclusion on the return. Though Art Appraisal Services does not provide the appraisal itself with the packet, it does include the majority of the information from the appraisal in the packet. Because the information in the packet derives from an appraisal which is attached to the taxpayer's return and which is received by the Service for the purposes of determining the taxpayer's liability, the information constitutes "return information."

At least one court has addressed whether property appraisals in particular constitute return information under section 6103. See Kamman v. United States Internal Revenue Service, 56 F.3d 46 (9th Cir. 1995). In Kamman, the Ninth Circuit, in the context of a FOIA lawsuit, addressed the issue whether private appraisals of property seized from taxpayers and sold at IRS auctions were exempt from disclosure under section 6103. The District Court had held that the property appraisals were return information. The Ninth Circuit reversed, finding that the appraisals were *not* return information because they were furnished to the Service after the taxpayer's liability had already been determined and therefore were not "with respect to a return" or the "determination of existence . . . of liability." Kamman, 56 F.3d at 49. Although the Service disagrees with the Kamman decision, it is factually distinguishable from the instant situation. Here, unlike in Kamman, the appraisals have been submitted with a return and for the purposes of determining the taxpayer's liability. Whereas the appraisals in Kamman were performed for the purposes of valuing seized property on auction, the appraisals here concern the value of objects included on the taxpayer's return, which value directly affects the object owner's tax liability. Accordingly, the appraisals of concern here, unlike those in Kamman, were attached to the taxpayer's returns and therefore were "with respect to a return" and the "determination of the existence . . . of liability." I.R.C. § 6103(b)(2). Therefore, because the appraisals are commissioned by the taxpayer, attached to a tax return, and submitted for the purposes of determining the taxpayer's liability, the appraisals constitute "return information."

While the appraisal standing alone would constitute return information, a question remains whether the reformulation of that information can alter its status. The flush language to section 6103(b)(2) provides that return information "does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer." The Supreme Court has interpreted this provision to mean that return information remains such even when the Service redacts identifying data. See Church of Scientology of Cal. v. Internal Revenue Service, 484 U.S. 9, 15 (1987). Under these circumstances then, removal of the taxpayer's identifying data from the appraisals would not alter their status as return information. Moreover, the packet is not "in a form" contemplated by the flush language to the statute. The information, although lacking identifying details, is not a statistical tabulation or an amalgamation of return data, but rather a reformulation of a single taxpayer's private information taken directly from the taxpayer's return. See King v. Internal Revenue Service, 688 F.2d 488, 494 (7th Cir. 1982). The reformulation of the appraisal information is more akin to a

redaction of identifying details than an amalgamation for statistical purposes. Therefore, the information derived from the appraisal and included in the packet remains return information as defined by section 6103.

Return information and PII are categories of SBU data. Therefore, both types of information are subject to similar security guidelines regarding transmission and storage. IRM 10.8, Information Technology (IT) Security, provides guidance for handling, transmitting and storing sensitive data within IRS information systems. One possible method for modernizing delivery of the packet is transferring the information to a portable CD or an external hard drive. The guidelines for the transmission of electronic media call for encryption of such information. IRM 10.8.1.5.2.10 (July 31, 2009). Accordingly, modernization of delivery of the packet, and the return information contained therein, should conform to current IRS policy on the protection of sensitive information and the use of electronic media devices.

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.